FORTUNE WEALTH (HONG KONG) LTD

v.

MAJU HOLDINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ J
[SUIT NO: D6-22-1635-1998]
31 OCTOBER 2001

COMPANY LAW: *Shares sale and purchase of shares - Call and put option*

CIVIL PROCEDURE: *Counterclaim - Fraudulent transaction*

CONTRACT: *Specific performance - Interpretation of terms - Recitals as aid for construction - Proof of execution - Consideration - Sufficiency - Contract under seal*

EVIDENCE: *Burden of proof - Fraud alleged in civil case*

The plaintiff and the defendant had agreed to grant option rights to each other over 1,646,000 ordinary shares of Ipmuda Bhd ('the option shares') pursuant and subject to the terms and conditions of a call and put option entered into by them dated 21 April 1997. The plaintiff claimed that the defendant had breached the agreement by failing, omitting and/or refusing to purchase the option shares upon the exercise of the put option by the plaintiff. The defendant categorically denied entering into such an agreement, contending that if at all there was such an agreement it was dated 1 April 1997, which date had been fraudulently altered to 21 April 1997.

The defendant also contended *inter alia* that the plaintiff was not the beneficial owner of the option shares, that it was not entitled to the remedy of specific performance and that the purported consideration of the call option did not in law amount to good consideration.

Held:

[1] It is trite that he who asserts must prove. It was clear from the pleadings and the evidence adduced from witnesses that the plaintiff had established its case that the agreement was dated 21 April 1997 and not otherwise as alleged by the defendant. The defendant had failed to adduce any documentary evidence to support its allegation while its witnesses merely expressed hearsay evidence. The execution of the agreement was proved by a subscribing witness and it bore a date which was *prima facie* evidence that the agreement was executed at the time when it purported to bear that date. (pp 337 a-f)

[2] It is a cardinal rule in the interpretation of contracts that recitals may be adopted as an aid to construction. In the instant case, cl. 2 of the recital of the agreement clearly stated that the plaintiff was the beneficial owner of the option shares. This was further evidenced by the annual report. The defendant's contention to the contrary bore no merit as it had knowledge of the beneficial share holding of the plaintiff in the option shares. (pp 338 a-h & 339 a-d)

[3] Sufficiency or insufficiency of consideration does not in any way vitiate the cause of an agreement. In this case, where the document was signed by the defendant under the hand of its two directors and by affixing the company's seal, consideration was not necessary. (p 339 e)

[4] The defendant having been served with the exercise notice and letter of demand by the plaintiff, took no steps to dispute those demands and failed to solicit the advice of its in-house legal officer whose primary duty was to protect the interest of the company against claims. The defendant also failed to challenge the forced sale of the option shares and the losses suffered by the plaintiff due to a fall in the price of the said option shares. (pp 339 g-i, 340 a-i & 341 a-f)

[5] The defendant's amended defence and counterclaim was a bare traverse and avoidance and one which did not specify the exact contention required to prove its affirmative defence against the plaintiff's claims. The defendant had failed to counter the plaintiff's claims by not leading any supportive evidence against the plaintiff. (p 342 e-g)

[Judgment for plaintiff; defendant's counterclaim dismissed.]

Case(s) referred to:
Anderson v. Weston [1840] 6 Bing NC 296 ***(foll)***
Luggage Distribution (M) Sdn Bhd v. Tan Hor Teng & Ors [1995] 2 CLJ 713 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 169
Evidence Act 1950, ss. 103, 114(g)
Rules of the High Court 1980, O. 40, O. 81

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 9, p 183, para 309

For the plaintiff - VK Lingam (VK Lashmi); M/s VK Lingam & Co
For the defendant - David Morais (Kabir Dhillon & Gurmel Singh); M/s Mohamad Illiayas & Co

Reported by K Ganesh

JUDGMENT

KL Rekhraj J:

The plaintiffs claimed that by a call & put option, dated 21 April 1997 and entered into between the plaintiffs (as the grantors) on the one part and the defendants (as the grantees) on the other part – (please see P3) wherein the grantor (plaintiff) is identified as the beneficial owner of 1,646,000 ordinary shares of Ipmuda Berhad hereinafter called the option shares and both the grantor and the grantee (ie, the plaintiffs and the defendants have agreed to grant option rights to each other over those option shares; upon terms *inter alia*:

(1) "Call option" – means the right for the grantee (the defendant) to purchase from the grantor (plaintiff) and to require the grantor (plaintiff) to sell or cause or procure the sale of the option shares to the grantee (defendant) ... .

"Call option period" means the period commencing on the date of this agreement and ending at 5pm on the last trading day falling twelve (12) months after the date hereof.

"Company" means Ipmuda Berhad.

"Completion date" means the date on which the sale and purchase of the option shares is to be completed pursuant to cl. 4 thereof.

"Exercise Notice" means the notice of the exercise to be given by the grantee (defendant) to the grantor (plaintiff) or by the plaintiff (grantor) to the defendant (grantee), to exercise the call option or the put option ... .

"Option price" means the aggregate sum payable by the defendant (grantee) to the plaintiff (grantor) for the option shares.

"Put option" means the right for the plaintiff (grantor) to sell to the defendant (grantee) and to require the grantee to purchase or cause or procure the purchase by the defendant (grantee), upon terms and subject to the conditions of this agreement; all but not part of the option shares at the option price – which in the Schedule I of P3, is fixed at RM12,427,300 calculated on the basis of RM7.55 sen per share.

"Put Option Period" – means a period of seven (7 days) commencing from the date of the expiration of the call option period.

By cl. 2.1 of the call & put option; the consideration in the sum of RM10 is acknowledged to have been paid by the grantee to the grantor; to require the grantor to sell and or procure the sale by the grantor to the grantee the option shares; and the grantee to purchase ... from the grantor the option shares free of restrictions ... and all other encumbrances ... on the completion date at the option price ... .

a The call option is to be exercised by the grantee ... by serving upon the grantor the exercise notice; at anytime during the call option period ... ; and upon the grantee exercising the call option, the grantor to sell to the grantee the option shares ... .

b Further by cl. 3 of the agreement; it was reserved that in consideration of the call option granted by the grantor (plaintiff) to the grantee (defendant), the grantee (defendant) thereby irrevocably granted to the grantor (plaintiff) during the put option period, the put option to purchase ... by the grantee.

c By cl. 4.1 of the agreement; it was provided that upon the grantee (defendant) exercising the call option ... or upon the grantor (plaintiff) exercising the put option ... completion of the sale and purchase of the option shares, shall take place at the office of the grantee (defendant) or at such other place ... on the trading day falling seven (7) trading days after the exercise of the call option or the put option, as the case may be through stockbrokers to be nominated *d* by the grantor and the grantee ... .

e The grantor by cl. 5 thereof warranted and undertook to the grantee (defendant) that the grantor (plaintiff) was and will, for the completion of the sale and purchase of the option shares pursuant to the exercise of the call option be legally or beneficially entitled to or otherwise be able to cause or procure the transfer of the option shares ... free of all encumbrances ... on the completion date.

f By cl. 6 it was provided that in the event any of the parties to this agreement defaulted in the performance and/or fulfillment of any of the obligations ... the non defaulting party shall be entitled to take such action (legal, equitable or otherwise) and to seek such remedies as may be available to the non-defaulting party as may be necessary, to compel the defaulting party by way of specific performance to perform and/or fulfil such obligations and undertaking but not limiting to, to complete the sale and purchase of the option shares in accordance with the provisions of this agreement.

g By cl. 8.1; all notices, demands or communication required to be given under this agreement shall be in writing and shall be sufficiently served on the grantor and/or the grantee if delivered by hand ... at the respective addresses. But by cl. 8.3 it was reserved that "not withstanding the provisions of cl. 8.1 *h* the exercise notice must be delivered by hand to the grantor (plaintiff) or to the grantee (defendant) at their respective addresses and shall be deemed to be served and the acknowledgment of receipt thereof by the grantor/grantee as the case may be.

i

Time wherever mentioned was made the essence of this agreement under cl. 11 (eleven).

The said call & put option (P3) was signed and delivered by Miss Loke Foong Meng for and on behalf of the grantor (the plaintiffs); in the presence of Phang Ah Hee an advocate and solicitor, Kuala Lumpur; who upon her so signing, affixed his signature and the date as 21 April 1997; thereat, whilst the grantee's (defendants) common seal was then found to have been affixed in the presence of director/secretary and another director of the defendant company.

The said call & put option carried an annexture head note "exercise notice" which was required to be given by the party to the other upon the completion of sale/purchase and which exercise notice had been given by the plaintiffs to the defendants on 27 April 1998 and was found to be duly acknowledged by the defendants at 5.35pm under the hand of Suzana Abdul Rahman of Maju Holdings Sdn. Bhd (please see P4).

As a background and within the four corners of this agreement – (P3) the plaintiffs claimed that on 20 April 1998, the call option period had expired; and on 27 April 1998, during the put option period, the plaintiffs had exercised its option by delivering a copy of the exercise notice – P4 – by hand to the defendants and agreeing to sell to the defendants; and requiring of the defendants to purchase or cause to purchase all the said option shares (1,646,000) at the option price of RM12,427,300 calculated on the basis of RM7.55 sen per share.

The plaintiffs claimed that the defendants had breached the said agreement by failing, omitting and/or refusing to purchase the said option shares pursuant to the said exercise notice notwithstanding the plaintiffs have throughout been ready and willing to complete and fulfil all their obligations under the agreement. The plaintiffs then on 13 May 1998 through their solicitors M/s Gooi & Azura caused to issue against the defendants a demand letter demanding of the defendants to purchase and or cause to purchase the option shares in accordance to the provisions of the said agreement.

The defendants again failed to act upon the plaintiffs solicitors demand letter; resulting in the plaintiffs issuing a writ on 26 May 1998, claiming:

(a) Specific performance of the agreement.

(b) Alternately damages *in lieu* of specific performance.

(c) Interest on the damages at 8% pa from 28 April 1998 to the date of full payment.

(d) Damages for breach of contract.

(e) Costs and such other order or further relief as the court may deem just and appropriate.

The defendants on the other hand on 7 July 1998 filed their defence and later the amended defence and counterclaim pleading *inter alia*:

(i) The defendant denies entering into the alleged agreement with the plaintiffs.

(ii) If, which is denied, the defendant did enter into such an agreement with the plaintiffs, the defendant denies that the said agreement was dated 21 April 1997. The defendant states that the said agreement was dated 1 April 1997 and not 21 April 1997 as alleged. The defendant further stated that the date of the said agreement had been fraudulently altered by adducing the numeral '2' in such a manner that the original date 1 April 1997 now comes to read 21 April 1997.

By para. 4 to 7 of the defence, the defendant pleaded:

(a) that the plaintiffs were not at any material time the beneficial shareholders of 1,646,000 shares in Ipmuda Berhad or at all.

(b) That the term as to time being the essence was not in cl. 1 of the agreement; and that

(c) the purported consideration of the call option does not in law amount to good consideration.

(d) That the plaintiff were not entitled to the remedy of specific performance.

(e) That the said agreement was dated 1 April 1997 and not 21 April 1997; and therefore the call option period ended on the last trading day falling 12 months after 1 April 1997; ie, on 31 March 1998.

(f) That the put option period being a period of seven trading days commenced on 31 March 1998 and expired on 10 April 1998; and that in those circumstances, the exercise notice – P4 was being exercised on 27 April 1998 well outside the time period available for the plaintiffs to exercise the put option; and as such was of no effect whatsoever.

(g) That the plaintiffs were not ready, willing and able to complete the said agreement – or to fulfill its obligations under the said agreement.

(h) That the plaintiffs in any event were not entitled to the remedy of specific performance for reasons that the option shares being shares of a public company listed on the Kuala Lumpur stock exchange were freely available and saleable; and as a result the plaintiffs claim be dismissed with costs.

The plaintiffs too on the same date ie, 7 July 1998; without knowledge of the defendants defence of even date; filed a summons in chambers (encl. 5) for an order pursuant to O. 81 of the Rules of High Court 1980 for specific performance on the call & put option dated 21 April 1997 as referred to in the statement of claim; and averring that the defendants have no defence to the plaintiffs claim. The said application was fixed for hearing before me on 27 July 1998.

At the hearing of this application – (encl. 5) the defendant filed an affidavit in reply through Encik Mohd. Fauzi bin Yon (please see encl. 6) claiming to be the director of the defendant company and deposing that the facts deposed therein were to the best of his knowledge, true ... and were within his personal knowledge; and were capable of being proved with documents in his possession. By para 6(e) the said Encik Mohd. Fauzi Yon repeated upon Oath "that the defendant executed all the said agreements which were all dated 1 April 1997. They were all dated 1 April 1997 ..." and by para 5; said "that the agreement was fraudulently altered by introducing the numeral '2' such that the original date of 1 April 1997 now reads 21 April 1997. Lastly by para 9.1 deposed:

(i) That as the said agreement was dated 1 April 1997 and not 21 April 1997, the call option period ended on the last trading day falling 12 months after 1 April 1997 ie, 31 March 1998.

That the put option period expired on 10 April 1998; and that in those circumstances, the exercise notice – P4 which was issued by the plaintiffs on 27 Apil 1998 was exercised outside the time period available to the plaintiffs to exercise the put option; and thus was of no effect whatsoever; and by paragraph eleven (11) thereof stating that he verily believed that the defendant had shown merits or there were serious issues to be tried.

Enclosure 5 – the application for specific performance taken out by the plaintiffs was fixed for hearing on 4 November 1998; on which date the solicitors for the parties by consent informed the court that any decision in D6-22-l635-1998 shall bind the other action in D6-22-1634-1998. Upon hearing encl. (5) – the application for specific performance I, dismissed it on the only ground, that there appeared to be a serious issue then "of the fraudulent act as alleged in the alteration of the date from 1 April 1997 to 21 April 1997" and not otherwise.

After the disposal of encl. (5) both the actions lay dormant in the court registry until a show cause letter was issued for a hearing on 6 August 1999. At the hearing of the show cause proceedings the solicitors for the defendant informed the court of their intention to send the document – P3 to the chemist department for forensic verification.

Not hearing from the defendants in their referring P3 to the chemistry department the court proceeded on 20 October 2000 to give the necessary directions and had the case fixed for trial for three days commencing on 4 to 6 December 2000. In the midst of the trial, the defendants filed a summons in chamber (encl. 45) supported by an affidavit of Encik Mohd. Fauzi bin Yon – and requesting of this court for an order to refer the P3 document, for chemical analysis by the Jabatan Kimia Malaysia. The said application was heard on 22 December 2000 and the court then decided to adjourn the decision to a later date pending the adducing by the defendants of some evidence on the fraudulent act or alteration; and ruled that if at the end of the trial, the court was of any opinion, that such a report was required to come to some decision making; the court shall then, upon its own motion take the liberty to make a reference; as at the time of hearing the application, the court found no evidence adduced to warrant any reference to the Jabatan Kimia Malaysia.

I have even at the close of this trial found no evidence of any such fraudulent alteration as alleged; nor was there produced to court any other supporting document to the contrary by the defendants, and took the stand not to refer P3 on the allegation to the Jabatan Kimia for their opinion; as I could then make an independent finding of fact on the evidence before me of DW3 Christopher Chew to the effect that when he returned the documents to the office of Mr. Koh Kim Teck, they were then in blank and also after taking into consideration the evidence more particularly, the evidence of PW2 Mr. Phang Ah Hee – an advocate & solicitor who gave an unchallenged evidence to the effect that P3 was signed at his office on 21 April 1997 and he thereafter attesting and dating the document. In making a decision on this case; there is not much law involved but only hard facts are required; more particularly whether the said agreement – P3 was in fact dated on 21 April 1997 or 1 April 1997. The defendant's solicitor Mr. David Morais at the hearing on 4 December 2000 in the making of an application, for the appointment of a Government Chemist to be appointed as a court expert under O. 40 of the Rules of High Court rightly said. "If the call option was dated 1 April 1997 as the defendants contend – and not as 21 April 1997 as the plaintiffs contend; then the issue is resolved and we don't have to go into other issues. This issue can be decided summarily."

From the pleadings – the statement of claim; the amended defence; the counter claim and the reply and upon the evidence led by PW1 and PW2, the plaintiffs case is established in that the said agreement was in fact dated 21 April 1997 and not 1 April 1997 as alleged by the defendants witnesses PW5 Encik Mohd. Fauzi Yon; and DW6 – Encik Hamidi Abdullah who were expressing hearsay evidence. The defendants had failed to produce to this court any documentary evidence – not a single document in support – to show that they have a document with them which is dated 1 April 1997 for comparison. In fact DW3 Mr. Christopher Chew – the director who was personally responsible in obtaining the agreements from the office of Mr. Koh Kim Teck and seeing to their execution and sealing by the directors of the defendant company; and subsequently returning them to the office of Mr. Koh had said, that the agreements when he returned to Mr. Koh's office were never dated with the date 1 April 1997. "The dates on the agreements were left blank. I am sure about that." With that evidence on record, I find as a fact that the agreement was in fact dated 21 April 1997; and not as 1 April 1997; and with that; the case is summarily decided on the main issue. The law of evidence is quite clear under s. 103 of the Evidence Act 1950; that he who asserts must prove that fact; and that onus was on the defendants; which they had failed to do so. In the case of *Anderson v. Weston* [1840] 6 Bing. NC 296 it was held that when a deed is produced (as P3 in this case under the defendants seal) and the execution of the deed (P3) is proved by the subscribing witness (in this case by PW2 – an advocate & solicitor of the High Court KL affirming on Oath his having affixed his signature on 21 April 1997 immediately upon PW1 – representative of the plaintiff had signed in his presence) the signature; and that deed bears a date ... that date has uniformly been taken to be *prima facie* evidence that the deed (P3 in this case) was executed at the time when it purports to bear the date." Having dealt at length on the main issue as to the date of the agreement, I must now touch in general on:

(a) Whether the grantor (plaintiff) is the beneficial owner.

(b) The consideration paid for the call option and the put option.

(c) The service of the exercise notice (P4).

(d) The solicitors letter of demand dated 13 May 1998.

(e) Computation as to the claim for damages in the sum of RM10,138,441.35 sen.

(a) Beneficial Ownership

The defendants in their amended defence and the counterclaim alleged that the plaintiffs were not at the material time the beneficial shareholders of the Ipmuda Shares. One just has to read cl. (2) of the Recital (P3) which reads "the grantor is the beneficial owner of the number of ordinary shares ... as set out in the schedule one; which schedule item 2 shows 1,646,000. The Court of Appeal (per Justice Dato' Sri Ram JCA) in the case of *Luggage Distribution (M) Sdn. Bhd. v. Tan Hor Teng & Ors* [1995] 2 CLJ 713 at p. 732 said, "it is a cardinal rule in the interpretations of contracts that recitals may be taken into account as an aid to construction ... the court may construe a recital as carrying with it an obligation to carry into effect that which is recited."

Further the annual report of Ipmuda Berhad was presented to the Ipmuda Board through its executive chairman Tan Sri Abu Sahid; who also happens to be the executive chairman of the defendant company; and there said "on behalf of the board of directors, I am pleaded to present this annual report for the year ended 31 December 1998." At p. 14 of the said annual report (please see exh. P12) items (15) and (16) at p. 12 carries the name of the plaintiff (Fortune Wealth Hong Kong Ltd.) as having a direct shareholding of 1,646,000 shares and by item (16) the Regalion Investment Ltd. – (the plaintiffs in Civil Suit D6-22-1634-1998) owning direct share holdings of 1,600,000 shares; and this information was given to court by DW1 (Miss Chan Lai Choon the company secretary). In her evidence under cross-examination she said "I am aware that Maju Holdings – the defendants herein had entered into a call and put option agreement with the plaintiffs." "That P11 & P12 are the annual reports (the statutory reports) to be made under s. 169 of the Companies Act; and such reporting is statutorily required to be made pursuant to KLSE listing requirement. Before these reports are printed, the board of Ipmuda Berhad will approve the Audited Accounts ... The final decision on the annual reports – P11 & P12 is given by Mr. Loh Siew Choh. The executive chairman of the board Tan Sri Dato' Abu Sahid has seen the report before printing."

To a question by the court – whether the chairman was aware of those statements, Miss Chan answered – "Yes."

She also confirmed that P11 & P12 the annual reports were also sent to the share holders of Maju Holdings – the defendants herein; and upon her sending to them no objections from any of the share holders of Maju Holdings were received on the share holdings of Fortune Wealth Hong Kong Ltd. of 1,646,000 shares. Not even Tan Sri Abu Sahid raised any objection on the share holdings as shown in P12 p. 14, item 15. Further confirming that the statement (in the annual report) is never wrong.

A similar pattern of confirmation on the share holding is noted from the cross-examination of Mr. Christopher Chew – DW3. "This annual report (P11) was approved by the board of directors of Ipmuda Berhad before I signed it at p. 22 and at p. 55 thereof. I confirm that all the information given in the annual report is correct. I agree that under items 15 and 16 shows: Fortune Wealth (Hong Kong) Ltd. having a direct share holding of 1,646,000 shares in Ipmuda; and under item 16, Regalion Investment Ltd (the plaintiff in the other suit-consolidated) is shown having direct share holding of 1,600,000 shares in Ipmuda. I agree that this information given there is accurate. When this report was approved by the board of directors of Ipmuda Berhad, I was present with Tan Sri Abu Sahid in approving. I agree Tan Sri Abu Sahid has knowledge of this direct share holdings – under items 15 & 16 referred above when he was appointed as the managing director for Ipmuda Berhad in April 1997." This seals the issue of a fact that the defendants had throughout knowledge of the direct/beneficial share holdings of the plaintiffs in Ipmuda Berhad.

(b) The Consideration

The defendants in their amended defence questioned whether the consideration was a good consideration in law. This is a point of law; and suffice it to say that the sufficiency or insufficiency of the consideration, does not in anyway vitiate the cause or the agreement; more when in this case the said agreement P3 was signed by the defendants under the hand of their two directors and by the affixing of the defendant company's seal. It has been held that where such a document is made under seal, consideration is not required (see *Halsbury's Law of England* 4th edn, vol. 9, at p. 183, para 309) "consideration is not necessary, however, in respect of a promise made under seal."

(c) The Service Of The Exercise Notice/Demand Letters

DW5 Encik Mohd. Fauzi bin Yon in his evidence in chief on 9 October 2001 when shown encl. (6) an affidavit affirmed by him on 21 July 1998, said "I affirmed this affidavit on behalf of the defendant company in reply to the application made by the plaintiffs for summary judgment for specific performance. I am familiar with the transaction. When shown encl. (28) p. 105, which is the exercise notice dated 27 April 1998 (P4) said, "this exercise notice was received by the company and it was brought to my attention after two days. Upon receipt of this notice, I referred this matter to the company's – in house legal officer Encik Hamidi Abdullah – (DW6).

Encik Hamidi informed me that Mr. Christopher Chew (DW3) was directly involved in this. I then asked Mr. Christopher Chew to come to my office to brief me on this transaction. Mr. Christopher Chew told me that these agreements were extended to Maju Holdings to be executed and signed on 1

April 1997. He told me that the agreements were executed on 1 April 1997 by the group executive chairman and another director _ Datuk Khairuddin." When shown P3 – the cover page and the second page showing the date 21 April 1997. His reply was: "Mr. Chew informed me that the date 21st was fraudulently altered by the plaintiffs to reflect by putting the figure '2' in front of '1'."

Under cross-examination Encik Mohd. Fauzi said "I say Mr. Christopher Chew also discussed with me about how the mechanism of the call and put option works; not specific to this call and put option. Then we also discussed this particular call and put option. I went through the actual agreement – P3 I noted the 1,646,000 as shares in the schedule one. I saw the particulars of the grantor as Fortune Wealth (Hong Kong) Ltd; the number of shares 1,646,000 and the option price of RM12,427,300 calculated on the basis of RM7.55 sen per share; and the said call and put option were signed as appear in P3. I confirm P3 is carrying a seal of Maju Holdings Sdn. Bhd. and the signatures therein of (i) Datuk Khairuddin and (ii) Tan Sri Abu Sahid.

We then saw the date of the agreement as 21 April 1997; and similarly on the second page as 21 April 1997. At this meeting on 2 May 1998 we discussed the agreement P3 and P4 the exercise notice and understood the contents. P3 was brought to me by Encik Hamidi – (DW6) when I asked for it. After the discussion, I alerted this to the executive chairman. The chairman then asked for Encik Hamidi – our legal officer to brief him in more detail on the P3 & P4."

When shown to the witness (encl. 6) his affidavit dated 21 July 1998 said, "I confirm that I saw P3 only on 2 May 1998. I have never before this date seen any call and put option agreement, including the agreement dated 1 April 1997." Further down the line under cross-examination in para. 2 of the said encl. (6) said, "the facts deposed herein are to the best of my knowledge true ... and are within my personal knowledge and capable of being proved with documents in my possession. The defendants executed all the said agreements which were dated 1 April 1997. They were all dated 1 April 1997 because Mr. Koh Kim Teck insisted that it be so."

The defendant witness herein, notwithstanding deposing of his being in possession of the documents, failed and or refused to produce any document resulting in the court to come to the only conclusion of adverse inference under s. 114(g) of the Evidence Act 1950 that the said documents if produced would be unfavourable to the person who withholds it. DW6 Encik Hamidi – the in-house legal officer of the defendant company touching on P4 – the exercise notice dated 27 April 1998 had this to say, "I have seen this notice – the

first time one or two days after 27 April 1998. This notice was forwarded to me by the defendant company receptionist. Upon receipt of P4 I faxed it to Mr. Christopher Chew DW3; I then referred this letter to Mr. Fauzi Yon (DW5).

When I referred this matter to Encik Fauzi Yon; he asked me for a copy of this agreement referred to in the notice to exercise. I did not have a copy of this agreement in the office. I spoke to Mr. Christopher Chew (DW3) asking for the agreement. He was not able to give me the copy; but he gave me one or two days later."

When shown P5 a letter of demand from the solicitors dated 13 May 1998 (see encl. 28 at p. 115), Encik Hamidi confirmed seeing that demand letter because it was forwarded to him as the in-house legal adviser. Upon receipt of the demand letter, he does not recollect what he did, except recalling speaking to Azura Alias – the partner of the law firm and who wanted to know whether the defendants would settle the matter.

A point of special note here is that the defendants, who having been served with the exercise notices by the plaintiffs and the letters of demand from the plaintiffs solicitors together with similar notices from the Regalion Investment Ltd as admitted to by DW6 under cross-examination took no steps to reply either directly or through the defendants solicitors disputing those demands incurring millions of ringgit instead he being the legal officer, was asked to leave the meeting; because Mr. Christopher Chew wanted to tell Encik Fauzi Yon about the arrangement wtth the broker; which was to be discussed in confidentiality without the presence of DW6 – the in-house legal officer – whose main duty was to protect the interest of the company against the intended claims.

Computation Of Damages If Any

The plaintiffs' witness PW1 in her evidence said that upon their giving the required exercise notice – P4 and the plaintiffs' solicitors demand letter – P5; and upon default being made, the plaintiffs then issued to the defendants a further notice by letter dated 16 April 1999 (please see encl. (28) p. 116 – and marked) – P6 to the personal attention of YB Datuk Abu Sahid informing him of the plaintiffs intention to force sell those shares, if the plaintiffs did not receive any objection in writing from the defendants within 24 hours. The said letter was acknowledged by Cik Siti Fatimah – I/C No. 691213-05-5386 on behalf of the defendants. This letter too referred to the call & put option agreement dated 21 April 1997 and upon not receiving any objections the plaintiffs proceeded to sell the shares, commencing from 23 April 1999 until 14 January 2000 to cut down the losses. After having sold all the shares M/s Gill & Tang – the plaintiffs previous solicitors *vide* their letter dated 9

November 2000 – wrote to M/s Mohamad Illiayas & Company – marked P7 enclosing copies of all the sales in respect of Fortune Wealth (Hong Kong) Ltd. dated 22 January 2000 and of Regalion Investment Ltd. dated 8 July 1999 for their attention showing in the enclosure the dates of the sale, the quantity sold; the selling price; the contract notes and the net sale proceeds received from each sale on the 1,646,000 shares for total value at RM2,288,858.65 sen; and ending up the statement by requesting that Maju Holdings be accordingly informed. The said witness PW1 said that taking the total option price of RM12,427,300 calculated on the basis of RM7.55 sen (see encl. 28 p. 105 (P4)); and deducting therefrom the sale price recovered on the force sale in the sum of RM2,288,858.65 sen left them with a loss of RM10,138.441.35 sen as a balance on their claim together with interest at the rate of 8% p.a. on that sum.

Here again, the defendants have not at all challenged the selling of those shares at the prices as contained in P7 and the losses suffered by the plaintiffs as a result of the fall of the price of those 1,646,000 shares in the sum of RM10,138,441.35 sen and interest as claimed thereupon.

Now, taking the evidence as a whole in totality of the witnesses; and upon reading the written submissions of the counsels, the defendants amended defence and the counterclaim appears to be just a general traverse and avoidance made by the defendants without their being specific to state definitely the exact contention that is expected of the defendants to prove their affirmative defence; against the plaintiffs. The traverse alleges only an implied fraud on the part of their own agent Mr. Koh Kim Teck; and the defendants without making Mr. Koh Kim Teck a party to the proceeding and or calling him as a witness to the witness – stand cannot claim to shift the onus of proof by merely shouting "WOLF" without there being one or being identified; and in those circumstances, after a very careful consideration of all the facts; as presented to court reject in totality the defendants defence and the counter claim as being of mere presumptive in nature; without leading any evidence in support against the plaintiffs.

I therefore enter judgment in favour of the plaintiffs in the sum of RM10,138,441.35 sen together with interest at the rate of 8% p.a. w.e.f 28 April 1998 – to the date of realisation and costs.

I further proceed to dismiss the defendants' counter claim with costs to the plaintiffs in this suit.

I further order that the sum of RM150,000 being the sum deposited with the then defendant solicitors M/s Cheang & Ariff – by way of security for costs pursuant to the court order dated 23 September 1998 be forthwith refunded to the plaintiffs solicitors together with all interest accumulated thereon. Lastly, as the decision of this suit was agreed to be made binding on the other Civil Suit No. D6-22-1634-1998 between Regalion Investments Ltd. and Maju Holdings Sdn. Bhd.; I accordingly enter interlocutory judgment in favour of Regalion Investment Ltd. the plaintiffs therein; and order that the senior asst. registrar or the deputy registrar of the High Court do proceed to formally assess the general damages; and or other ancillary relief, as prayed for.

I further dismiss the defendants' counterclaim in D6-22-1634-1998.